IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1653

THEODORE Q. CHILDS,

Petitioner,

against

LUCY GANT CHILDS,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Westchester County.

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Table of Contents.

CITATIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS:

CASES:

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Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York entered herein on February 22, 1978, dismissing petitioner's appeal to that Court.

The Opinions Below

The Order of the Court of Appeals of the State of New York, the Court below, was accompanied by a memorandum opinion reported at 43 N.Y. 2d 946, appended, *infra* at p. 11.

The Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which was the subject of the appeal to the Court of Appeals, was accompanied by a memorandum opinion reported at 60 A.D. 2d 639, appended, *infra* at p. 12.

The Decision and Order of the Supreme Court, State of New York, Westchester County, dated December 30, 1976 which was the subject of the appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, was not reported, appended, *infra* at p. 14.

Jurisdiction

The final order of the Court of Appeals of the State of New York was made and entered on February 22, 1978, and is appended hereto, *infra* at p. 11. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Question Presented

Whether Sec. 237, subdivision (b), of the New York Domestic Relations Law, which provides that the Court may make an award of counsel's fees in a custody proceeding only to a wife or mother upon her application therefor, and which makes no such provision for either the Court to make such an award to a husband or father or for an application to be made by a husband or father, denies petitioner, a father, the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

Constitutional Provision Involved

The Constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

Statute Involved

The statute involved is Section 237, subdivision (b), of the New York Domestic Relations Law, which reads as follows:

"Upon any application to annul or modify an order or judgment for alimony or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. With respect to any such application or proceeding, such direction may only be made in the order or judgment by which the particular application or proceeding is finally determined."

Statement of the Case

At the conclusion of testimony in custody proceedings in the Supreme Court, Westchester County, involving the application of the petitioner herein to have the sole custody of two infant children of the marriage awarded to him, the former wife made application for an award of counsel fees pursuant to Sec. 237(b) of the New York Domestic Relations Law. The petitioner herein opposed said application but did not apply for an award to him of counsel fees since no such award was authorized under the applicable statute, Sec. 237(b), *supra*.

The facts before the Court as to the circumstances of the respective parties were that petitioner herein was a lawyer who was currently earning approximately $19,000.00 per year, had assets of approximately $12,500.00 and was in debt to the extent of $61,781.49, whereas the former wife and mother had assets of approximately $464,000.00.

By Decision and Order dated December 30, 1976, the Court awarded custody of the two children to the petitioner and also awarded counsel fees and disbursements in the total amount of $13,500.00 to be paid to the former wife's attorneys by the petitioner. *Infra* at p. 14.

The petitioner herein appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from that part of the said Decision and Order which awarded counsel fees and disbursements to the former wife contending (a) that Section 237(b) of the New York Domestic Relations Law was unconstitutional under the Fourteenth Amendment to the Constitution of the United States because under it the Court could only award counsel fees to a wife or mother and (b) that the award of counsel fees was an abuse of discretion under the circumstances before the Court, even assuming the constitutionality of the statute.

In its order and memorandum decision entered on December 27, 1977, the Appellate Division, Second Department, modified the award of counsel fees by reducing it to $5,000.00, plus $1,500.00 disbursements. The Court stated that it did not reach the issue raised by petitioner as to the constitutionality of subdivision (b) of Section 237 of the Domestic Relations Law, because the appellant, having failed to request a counsel fee, lacked the standing to challenge the constitutionality of the statute. *Infra* at p. 12.

Petitioner appealed to the Court of Appeals of the State of New York from the order of the Appellate Division. A motion was made to dismiss the appeal and it was granted and the appeal dismissed upon the grounds that the appellant was not aggrieved by the modification at the Appellate Division and that no substantial constitutional question was directly involved. *Infra* at p. 11.

Reasons for Granting Writ

This case presents squarely and unequivocably the issue of the right of a state, under the Equal Protection Clause of the Fourteenth Amendment, to provide dissimilar treatment for men and women who are similarly situated based purely on the sex of the parties.

New York Domestic Relations Law, Section 237, subdivision (b), which provides that the Courts of the State of New York in a custody proceeding may award counsel fees only to the wife or mother and further that only the wife or mother may make application therefor, denies petitioner, a male, the equal protection of the laws.

The sex line drawn by Section 237(b), of the New York Domestic Relations Law mandating that women (wives or mothers) may receive an award of counsel fees which men (husbands or fathers) may not receive under any circumstances, creates a classification requiring close judicial scrutiny. The legislature may distinguish between individuals on the basis of their need or ability. It is impermissible to distinguish on the basis of an unalterable identifying trait over which the individual had no control or for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, a trial of birth, and should not receive the recognition or sanction of our courts.

This Court recently has in a line of cases, upheld the equal treatment of men and women by the law.

Biological differences between the sexes bear no relationship to the ability of the person to pay counsel fees in a custody proceeding. The implied assumption in

Section 237(b) of the New York Domestic Relations Law that in general men are more wealthy and better able to pay such counsel fees than are women is totally without a rational basis. To subject men to this liability, when there is no basis in fact to assume that men in general are more wealthy than women, is patently unreasonable and constitutionally impermissible.

Within the context of Section 237, subdivision (b), of the New York Domestic Relations Law, the State of New York has devised a system under which a man may not receive counsel fees in a custody proceeding; and he may not even make application for such fees under the statute or the Rules of the Court. On the other hand, the woman may apply for and be awarded counsel fees. Both the substantive and procedural rights are denied to the man by the statutes of the State of New York. In spite of this lack of substantive and procedural rights, both the Appellate Division, Second Department and the Court of Appeals of the State of New York have used the asserted failure to make application for counsel fees by petitioner as the ground for not passing on the constitutional issue.

Despite the steady fall of barriers to equal treatment of the sexes, whether by judicial decree of legislative action, the legislature of the State of New York has failed to amend or repeal the discriminatory provisions of Section 237(b) of the New York Domestic Relations Law. Furthermore, the New York State Courts have consistently made awards of counsel fees to women under its provisions. There is no recorded New York case in which a man received an award of counsel fees under Section 237(b) of the New York Domestic Relations Law. It is clear from the law that such an award could not be made.

On its face, Section 237, subdivision (b), compels a distinction which is entirely gender-based.

There is no way that a court administering the statute can under any circumstances make an award of counsel fees to a husband or father even if justice required it under the circumstances of the case and of the parties. Weighing these matters where the wife or mother makes application, the court is in a position to award anywhere from nothing to an unspecified sum. Hence, Section 237, subdivision (b), draws a classification based purely on the sex of the parties, and it provides dissimilar treatment for men and women who are similarly situated.

The enactment of Section 237, subdivision (b) was based on the archaic and overbroad generalization that wives are non-productive, dependent persons and that husbands are the "bread winners" of families.

In determining whether Section 237, subdivision (b), is in violation of the Equal Protection Clause, it is necessary for the court to consider what justification exists for sex-based discrimination and what standard the court should apply in determining the statute's constitutionality. The Supreme Court traditionally followed the rule that the States do not have the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Reed v. Reed*, 404 U.S. 71 (1971). The *Reed* case involved a mandatory provision of the Idaho probate code which gave preference to men over women for appointment as administrator of a decedent's estate. In holding the provision of Idaho code violative of the Equal Protection Clause of the Fourteenth Amendment as being based solely on a prohibited sex discrimination, the court said at Page 77:

> "• • • By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. • • •"

Frontiero v. Richardson, 411 U.S. 677 (1973), involved statutes which provided the wife of a male serviceman with dependents' benefits but not the husband of a servicewoman unless it was proved that she supplied more than one-half of her husband's support. The majority of the court, citing *Reed v. Reed, supra,* found that classifications based solely on sex were "inherently suspect", thereby invoking the strictest test of judicial scrutiny. The challenged statutes were found to be unconstitutional. In the course of the majority opinion at Page 686, the Court said:

> "Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .' *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."

Other Supreme Court cases in which the challenged statutes involved sex classifications and were found to be unconstitutional are *Weinberger, Secretary of Health, Education and Welfare v. Wiesenfeld,* 420 U.S. 636 (1974); *Stanton v. Stanton,* 421 U.S. 7 (1975); *Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare v. Leon Goldfarb,* 430 U.S. 199, 51 L.Ed. 2d 270 (1977).

To conclude, under the "rational relationship" test of *Reed v. Reed, supra,* or the "close judicial scrutiny" test of *Frontiero v. Richardson, supra,* Section 237, subdivision (b), of the New York Domestic Relations Law is clearly violative of the Equal Protection Clause of the Constitution. There is no constitutional basis for the disparate treatment of mothers and fathers in Section 237, subdivision (b), of the New York Domestic Relations Law. The statute is constitutionally invalid.

Conclusion

The decisions and orders of the Courts of the State of New York clearly represent the imposition of a liability upon the petitioner herein under a statute of the State of New York which on its face clearly constitutes sex based discrimination. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Order and Memorandum of the Court of Appeals of the State of New York, dated February 22, 1978.

2 Mo. No. 94

LUCY GANT CHILDS,

Respondent,

vs.

THEODORE Q. CHILDS,

Appellant.

Motion to dismiss the appeal herein granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the grounds that appellant is not aggrieved by the modification at the Appellate Division (CPLR 5601[a][iii]), and that no substantial constitutional question is directly involved.

Order of the Appellate Division of the Supreme Court of the State of New York, 2d Judicial Department, dated December 27, 1977.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 27, 1977.

Hon. Henry J. Latham,
Justice Presiding,
Hon. John P. Cohalan, Jr.,
Hon. Vincent D. Damiani,
Hon. Frank D. O'Connor,
Associate Justices.

LUCY GANT CHILDS,

Respondent,

v.

THEODORE Q. CHILDS,

Appellant.

In the above entitled cause, the above named Theodore Q. Childs, defendant, having appealed to this court from so much of an order of the Supreme Court, Westchester County, dated December 30, 1976, as awarded plaintiff a counsel fee of $12,000, plus disbursements; and the said appeal having been argued by Theodore Q. Childs, Esq., *pro se*, and argued by Robert S. Cohen, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby modified, on the facts, by reducing the award of the counsel fee to $5,000, plus disbursements; and, as so modified, the said order insofar as appealed from is unanimously affirmed, without costs or disbursements.

Enter:

IRVING N. SELKIN

.....A. D. 2d..... A—December 8, 1977

2749 E

LUCY GANT CHILDS,

respondent,

v.

THEODORE Q. CHILDS,

appellant.

Theodore Q. Childs, New York, N. Y. (John J. Von Der Lieth of counsel), appellant *pro se.*

Lans Feinberg & Cohen, New York, N. Y. (Robert S. Cohen, Asher B. Lans, Deborah E. Lans and Mark J. Samuels of counsel), for respondent.

In a matrimonial action, the defendant husband appeals from so much of an order of the Supreme Court, Westchester County, dated December 30, 1976, as awarded plaintiff a counsel fee of $12,000, plus disbursements.

Order modified, on the facts, by reducing the award of the counsel fee to $5,000, plus disbursements. As so modified, order affirmed insofar as appealed from, without costs or disbursements.

To the extent indicated herein, the counsel fee allowed was excessive. We do not reach the issue raised by appellant as to the constitutionality of subdivision (b) of section 237 of the Domestic Relations Law. Appellant, having failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute (see 8 N. Y. Jur., Constitutional Law, §50).

Latham, J. P., Cohalan, Damiani and O'Connor, JJ., concur.

Decision and Order of the Supreme Court of New York, Westchester County, dated December 30, 1976.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

LUCY GANT CHILDS,

Plaintiff,

against

THEODORE Q. CHILDS,

Defendant.

Index No. 14276/73

CARUSO, J.:

The above entitled matter presents for determination a Custody Proceeding between plaintiff (mother) and defendant (father) involving two infant children; Edward, now 10 years of age, and Russell, now 8 years of age.

The custody of the said children was awarded to the plaintiff upon a Stipulation entered into by the parties after the conclusion of the contested divorce action. The Decree of Divorce thereafter entered on or about July 9, 1974, in favor of the plaintiff and against the defendant, provided that the custody of the two infant children above named be awarded to the plaintiff and the custody of the two older children; Theodore, Jr., now 20 years of age, and Martha, now 18 years of age, be continued in the joint custody of both parties with physical custody, however, to be awarded to the defendant father. Reasonable visitation rights were directed by said Decree to the defendant father with the infant children remaining in the custody of the said plaintiff.

The record discloses that after the termination of the action for divorce, the said infants, Edward and Russell, continuously resided with their mother (plaintiff herein) who was then residing in the marital home at Scarsdale, New York.

It appears that prior to the divorce proceeding, the plaintiff and defendant had been living separate and apart and, at or prior to said time, the plaintiff had sought psychiatric treatment with private psychiatrists and was undergoing a course of treatment at the Westchester Jewish Community Service in the area of her home.

Without the consent or knowledge of the defendant, plaintiff decided to enter both infant children with the said Westchester Jewish Community Service for the purpose of analysis, therapy and treatment. The older brother and sister learning of this situation strenuously objected and made known their objection to their mother; it being their considered opinion that the younger children, even though obstreperous and hostile to the mother, were not in need of psychiatric evaluation or treatment. This led to serious arguments between the older siblings and the mother and with the defendant; all of whom felt there was no need for such evaluation and psychiatric treatment. The plaintiff, whether as the result of an obsessive attitude that the conduct of the children towards her necessitated such treatment or for whatever reason, the situation led to serious complaints being made by the defendant father and older siblings both to the school officials where the children were attending and at the office of the Westchester Jewish Community Service.

The situation at the marital home became so hostile that, at a time when the daughter Martha was visiting the younger siblings at the Scarsdale home and resisted the efforts of her mother to take the children for treatment, an altercation occurred in which the mother physically bit the daughter and this, of course, has left its

scar and has further estranged the older siblings in their relationship with the plaintiff mother.

The testimony indicates that the conditions at the marital home in Scarsdale were deteriorating and the plaintiff mother was obviously losing the control and affection and love of the younger siblings. The matters became so intolerable for the plaintiff mother that in late December, 1975, without any notice or consent on the part of the defendant father, she vacated the said marital premises; moved practically all of the furniture and furnishings and contents of the marital home and removed the infant children with her to Chapel Hill, North Carolina; in the vicinity where her parents and family resided.

The defendant father, believing that the children were enjoying the Christmas holiday with the mother in North Carolina, did not attempt to visit the children at the marital home until after January 1, 1976. At that time, upon approaching the Scarsdale home, he found it vacant and locked. From neighbors he learned that the plaintiff had physically removed everything from the home and that the children were with her, but the whereabouts of the children were unknown to him at the time.

The defendant thereupon made appropriate investigation and learned the whereabouts of the plaintiff and the children in Chapel Hill, North Carolina, and found out that they had, in fact, already been entered and were attending a local public school and that arrangements had been made for their admission for psychiatric treatment in the out-patient facility of the University of North Carolina Memorial Hospital. The defendant, therefore, in order to preserve and protect his right of visitation with the children and in order to affirmatively move for the change of custody of the children under all of the circumstances proceeded to North Carolina and picked up the children after school and returned them to his home within the jurisdiction of the New York Courts. He

properly and appropriately gave due notice of these facts to the Chapel Hill Police Department so that the plaintiff was immediately made aware of the whereabouts of the children.

Shortly after the return of the children to the father's home in New York City, the defendant father moved, in this Court, by Order to Show Cause, why the Judgment of Divorce entered herein should not be modified and amended so as to award him sole custody and care of the infants, Edward and Russell.

The plaintiff wife, by cross-notice of motion dated February 6, 1976, moved affirmatively to dismiss defendant's motion and sought to modify and amend the Judgment of Divorce by deleting all visitation on the part of the defendant, except day visitation only under the supervision of a qualified adult. As further relief, the plaintiff required the defendant to post a surety bond; to direct him to pay all psychiatric costs for the children not covered by Blue Cross or Major Medical policies and to direct the said defendant to pay counsel fees to be awarded to plaintiff's counsel in the Custody Proceeding.

A plenary hearing was ordered upon all of the issues framed by the pleadings and was heard before this Court, sitting without a jury, commencing on February 13, 1976, and continuing on agreed adjourned dates through 18 court days and finally concluding on October 6, 1976.

During the hearing, numerous witnesses, both lay and medical, testified on behalf of both parties. Many exhibits were offered in evidence on behalf of both parties. The issues were bitterly contested by able counsel who, despite the intensity and feelings of the litigants, were extremely courteous to the Court and to the witnesses who testified.

Both counsel are to be commended for the professional manner and competence displayed in presenting their respective evidence. Excellent briefs upon the facts and

law were submitted by both counsel and have proved extremely helpful to the Court in reaching its decision herein.

The record herein, carefully reviewed by the Court, amply indicates that for some time prior to the divorce between these parties, there was a feeling of hostility and difficult situations existing between the mother and the four siblings. Complaints were made that the mother, for some reason, was proving inadequate to cope with the children; was a poor housekeeper; and did not provide assurance and confidence in the children and, generally speaking, had lost the control, love and affection of the children; particularly the two older children. This was made very obvious when, at the contested divorce trial, the two older children testified against their mother . . . a most unfortunate situation but none the less undoubtedly led to a complete severance of any cordial relationship between the older children and the mother. Added to this situation were the incidents already mentioned of the mother being concerned with the hostile and angry demonstrations by the younger siblings toward her; her conclusion that this type of conduct necessitated their admission for psychiatric treatment and the undoubted influence exerted by the two older siblings on their visits to their younger brothers, all of which caused a severe emotional impact upon these two youngsters. There was undoubted feeling on their part that their stay with the mother was an unenjoyable episode and expressed frequently that they were happier and more content while visiting with their father and in the company of their older brother and sister. It is upon these accumulated facts that the defendant father, of necessity and in good faith, has instituted the within proceeding for the sole custody of these children with reasonable visitation rights to be accorded to the plaintiff mother.

The plaintiff, on the other hand, bitterly feels that the defendant father and her older son and daughter are the

seat of her trouble with the younger siblings. She complained that they all encouraged the younger children to rebel; to be hostile; to refuse her commands and that they spoke ill of her and thereby caused the dissension which has been noted between her and the younger children. She, therefore, seeks to continue the sole custody of these young children and to permit no future visitation by the defendant father with them under the circumstances. This sharp conflict and bitter dispute between these divorced parents has presented a most difficult decision for this Court to make. Judicial history has recorded that starting with King Solomon, and down through the ages, experienced Jurists have unreservedly agreed that child custody proceedings present to a Court the most trying, sole searching, perplexing and difficult cases to decide. The instant proceeding is no exception. Upon the Court's decision and upon its insight and fairness may well rest the future and the happiness of these two young children.

In a custody proceeding arising out of a dispute between divorced parents, the law is well settled that the first and the paramount concern of the Court is and must be the welfare and the best interests of the child (Domestic Relations Law, Sections 70, 240; *Matter of Lincoln v. Lincoln*, 24 N. Y. 2d, 270; *Finlay v. Finlay*, 240 N. Y., 429).

Our Court of Appeals in the recent case of *Matter of Bennett v. Jeffreys*, 40 N. Y. 2d, 543, (decided September 21, 1976), eloquently stated the controlling considerations in custody proceedings, as follows; at page 546:

> "The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead,

in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a sub-person over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude (cf. *Goss v. Lopez*, 419 US 565, 574; *Matter of Winship*, 397 US 358, 365; *Tinker v. Des Moines School Dist.*, 393 US 503, 506; *Matter of Gault*, 387 US 1, 47)."

The Court is cognizant of the law that has been clearly and well established that "There is no prima facie right to custody in either parent." (Domestic Relations Law, Section 70, 240; *Lockwood v. Jagiello*, 24 App. Div. 2d 544; *Matter of Wout*, 38 App. Div. 2d 709; *Matter of Kevin M.*, 50 App. Div. 2d 959.)

The Court is further cognizant of the reluctance on the part of Courts to change custody of children unless a real and immediate need has been demonstrated to effect a change in order to preserve the welfare of the children. (*Nierenberg v. Nierenberg*, 43 App. Div. 2d 717; aff'd 36 N. Y. 2d 850; *Matter of Rodolfo "CC" v. Susan "CC"*, 37 App. Div. 2d 657.)

Apropos of the above, it is also to be considered that custody of children is to be established on a long-term basis—children should not be shuttled back and forth between divorced parents merely by reason of changes in marital status or economic circumstances of the parents. The advancement of the moral, emotional and psychological adjustment of the children with a showing that the new custodial parent is better suited and "more fit" to preserve the welfare of the children must be shown. (*Matter of Lang*, 9 App. Div. 2d 401; aff'd 7 N. Y. 2d 1029; *Matter of Wout, supra.*)

The criteria, in the final analysis, to be followed is, "does the change in custody outweigh the essential principle of continued stable custody of the children." (*Obeg v. Degling*, 37 N.Y. 2d 768; *Matter of Ebert*, 38 N. Y. 2d 700.)

With these guiding principles in mind, the Court will now review the record as bearing upon "what is best for the children."

The testimony indicates that following the return of the young siblings to New York by the defendant in January, 1976, they were enrolled in and are presently attending a distinguished private school, "Rumsey Hall School," in Washington, Connecticut. The defendant selected this school as being the best for its educational and social values in order to provide the "best" for his young sons. The children are, therefore, not residing daily with either parent and see their parents only on weekends (when permitted by the School) or on School Holiday sessions.

Each parent, by court order, has had regular alternate weekly visitation with the children away from the school (when permitted). The plaintiff has located an apartment in New York City where she now resides and the children are brought there on visitation days. The defendant has an adequate apartment for himself, his new wife (whom the children adore) and for his four children (when the two older children are home from their respective colleges). The family residence in Scarsdale has been sold by order of this Court and the net proceeds from the sale have been or will be shortly divided between the parties.

Since the children have been away from the "day to day" influence of both the parents and their older brother and sister, they have made remarkable progress in their school work; in their social relationship with other students and have been characterized by their teachers as "outstanding," "perfect gentleman," "hard workers" and "pleasant to teach." Edward, the oldest sibling, is presently a member of the Junior Football Team and has demonstrated

"considerable ability with hustle and sportsmanship." Russell, the youngest sibling, is now "reading at or slightly above grade level," has shown "a high native intelligence" and "will continue to make great strides. Academically he has been a most rewarding student."

The defendant has made it clear that he intends to continue these young children in the same school which they dearly love and are so pleased with.

The Court has carefully listened to the conflicting testimony of the many medical witnesses presented by both parties. In addition, the Court has had the benefit of the confidential reports of the Probation Department and the Court-appointed psychiatrists and psychologists who conferred and examined the parents and all of the children of the parties. The "Confidential Reports" have been marked "Court's Exhibit A" and have been placed in an envelope and sealed; to be opened only by the Appellate Court upon any review of this decision.

There was considerable testimony bearing upon the plaintiff's contention that the young siblings required and still require "psychiatric" treatment for their "emotional and behavioral problems." Upon the credible testimony adduced, this Court fails to find any support for this contention. It may well be that during and after the Divorce proceeding, these siblings suffered great "situational stress," made more intense by their being separated from the older siblings. This, in the Court's opinion, was a most unfortunate decision by these parents—but, perhaps, in the situation that existed, it was impossible to do otherwise. However, this separation of the siblings triggered the "emotional disturbance" which the plaintiff has complained of.

The infant siblings were observed by the Court on many days during the early period of the Hearing. The Court personally interviewed each of the said siblings alone and has had the benefit of speaking to them alone at length on at least four occasions.

On at least three occasions, the interviews were in the Court Chambers. Each sibling impressed the Court as physically well, alert, intelligent, well spoken, responsive and personable youngsters; well matured for their young ages. They were attending the Rumsey Hall School on each occasion and were well groomed and impeccably attired young gentlemen.

They expressed to the Court their entire satisfaction and happiness with the School and had made many friends. On the question of custody and visitation, (they being well aware of the nature of the pending proceeding between the parents), they both expressed in no uncertain terms their love and affection for both parents but a deep desire to be in the sole custody and care of their father. They stated that their visits to the father's home were interesting and happy episodes while their visits with the mother were unenjoyable, with too much "negative attitude" expressed by the mother.

The Court, in order to confirm the desires of these youngsters, towards the end of the Hearing invited the mother to bring the children to his home on their way back to School after a weekend with the mother. Again, upon inquiry of the youngsters—even with the mother sitting in another adjoining room—they both vigorously stated that they wanted to live with their father and with their older brother and sister, whom they both adore and for whom they have great admiration and respect. When the Court inquired as to why they felt so hostile to their mother, they, in effect, stated, "she picks on us all the time; we can't do anything; we don't go anywhere and enjoy it" and in general expressed displeasure being with her or "with her relatives." Their main desire at the time was to get back to the School and to their schoolmates.

From the facts determined herein, the Court concludes that these youngsters have been the victims of "marital discord" and a long "cold war" being waged between their parents and with their older brother and sister.

It is only natural that their physical, moral, mental and psychological well being has been impaired. An unhealthy environment has resulted and these youngsters cry out for their right to "happiness and contentment" in the household where they are to be reared. They have made it crystal clear that they can only find this "happiness and contentment" with their father and with their older brother and sister.

It is, of course, known to the Court that a "family (like a house) divided; soon falls" and, therefore, every effort should be exerted towards reuniting the siblings together as a "family unit"; (i.e., the older brother, sister and the two youngsters involved herein) with the father and his new wife.

Cases are legion to the effect that a child's preference in a custody proceeding should be carefully considered but not be determinative. The expressed wishes of these children, of sufficient age and understanding, taken with all of the attending facts and circumstances, must be given considerable weight by the Court. (*Pact v. Pact,* 70 Misc. 2d 100; *Repetti v. Repetti,* 50 App. Div. 2d 913; *Matter of Ebert, supra; Peo. ex rel Norwood,* 12 App. Div. 2d 579.)

Any other policy would be practically to abandon the jurisdiction of the Court and make the child the sole judge of his own interests and welfare. (*Hahn v. Falce,* 56 Misc. 2d 427; *Pact v. Pact, supra.*)

Examination of the testimony has failed to reveal any significant credible evidence that the defendant (father) is not a "fit" guardian for these children. The Court had ample opportunity to appraise the defendant. He appeared to be a stable, firm, intelligent and strong individual, a loving, concerned and caring parent dedicated to serving the best interests of these children.

This is not to suggest in any way that the plaintiff (mother) is not equally a loving, concerned and caring

parent. This lovely lady impressed the Court as a courteous and dignified gentle-woman for whom the Court has the highest regard. It is most unfortunate that for whatever reason this fine mother has lost the control, confidence and dependence of these children, which the Court prays will only be temporary. Time alone will provide the remedy—which with reasonable visitation will restore not only the love and affection of the younger siblings but also the older siblings. This, the Court dedicates its efforts and services to achieve, even though no longer holding the judicial position it now enjoys.

The totality of the record permits of no other conclusion than that the infant children herein be placed in the custody of defendant (father). This decision, as difficult as it has been, represents the Court's opinion that the welfare and best interests of the children require such a determination. (*Doolittle v. Doolittle,* 35 App. Div. 2d 684; *Wout v. Wout,* 32 App. Div. 2d 709.)

In view of the above finding, the plaintiff's motion to dismiss and to delete visitation rights granted under the Decree of Divorce and for other allied relief requested in the cross-motion is respectfully denied.

The defendant's motion to amend the Decree of Divorce and eliminate the provisions for child support is granted in all respects. The Court has been assured that the children will be continued in Rumsey Hall School and will be provided with higher education thereafter in accordance with his financial ability. In view of the fine education afforded both Ted, Jr., and Martha, the Court is certain that defendant will do no less for Edward and Russell. Any financial assistance that may be given by the mother and her family should, of course, be continued and the Court urges full cooperation in this regard.

As to the application for the award of counsel fees by the plaintiff, the motion is in all respects granted. However, on the basis of the financial ability of both parents (both of whom will share the net proceeds of the sale of the marital home and have other income and earnings), the Court finds that the plaintiff should share the payment of counsel fees in addition to that fixed by the Court which the husband will be directed to pay.

The Court is well aware of the extensive legal services rendered by able counsel for the plaintiff not only from reading the affidavit of service filed herein but by being privy to the "day to day" services rendered during the protracted Hearing conducted herein.

In determining the award of counsel fee to be made herein, the Court has taken into consideration all of the factors which have been enunciated over the years by our Courts; i.e., the time expended; the nature and quality of the legal services; the difficulty of the questions involved; the skill, professional standing and expertise of counsel; the benefit derived by the client and the existing customary hourly fee for legal services prevailing in the area. The above have been considered along with the ability of the husband to pay for such legal services. (For principle involved; see *Matter of Freeman,* 34 N. Y. 2d 1; *Matter of Potts,* 123 Misc. 346; aff'd 215 App. Div. 59; aff'd 241 N. Y. 593.)

Considering all of the factors related above, the Court fixes and awards counsel fees herein in the sum of Twelve Thousand ($12,000) Dollars plus disbursements of $1,500; a total of Thirteen Thousand Five Hundred ($13,500) Dollars which the defendant is hereby directed to pay to plaintiff's attorneys within thirty (30) days after the service of a copy of this Decision and Order, with notice of entry, is served herein.

By this decision, the Court has not intended to fix the value "in toto" of counsel's services. The plaintiff is liable under her retainer with her counsel and any amount not directed to be paid by the defendant (husband) herein is strictly her concern.

The Court under the Domestic Relations Law can only fix the "counsel fee" to be paid by the husband and cannot rule upon any contractual rights (if any) between plaintiff and her counsel.

The present visitation rights accorded to the plaintiff must be somewhat restricted in view of the necessity for these youngsters to enjoy their School athletic and social programs or weekend activities with their schoolmates. They should not be subject to weekly "must" visitations.

Accordingly, while school is in session, the plaintiff shall have visitation with the children away from the school one weekend a month (to be selected by agreement between the parties); in addition; during school holiday recess periods (more than 2 days) visitation shall be shared equally between the parents. During vacation period of each year, the plaintiff shall have the children with her for the entire month of August (subject to camp enrollments, which shall be agreed upon.)

Any other visitation shall be by agreement between the parties or by Court order, if the parties cannot agree.

The parties are directed to make all visitations interesting and enjoyable for the children. No attempts to influence them against a parent will be tolerated and no hostility shall be demonstrated by either parent towards the other in the presence of the children.

The visitation periods shall be considered by both parents as the medium of restoring and strengthening the bonds of love, affection and confidence of these children towards both parents.

The foregoing Decision contains all of the findings required under Section 4213b CPLR. The foregoing shall be deemed the Decision and Order of this Court in this proceeding. No other Order is required to be filed or served herein.

To commence the statutory time period for any appeal from this Order as of right (CPLR 5513 [a]), either party is advised to serve a copy of this Order with notice of entry upon the other.

Dated: White Plains, New York
December 30, 1976

/s/ JAMES R. CARUSO
Acting Supreme Court Justice

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1653

THEODORE Q. CHILDS,

Petitioner,

- against -

LUCY GANT CHILDS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

BRIEF FOR RESPONDENT IN OPPOSITION

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Of Counsel

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent opposes the petition for a writ of certiorari to review the order of the Court of Appeals of the State of New York entered on February 22, 1978 (A. 11).

QUESTIONS PRESENTED

1. Is the order, review of which is here sought, final within the meaning of 28 U.S.C. § 1257 where petitioner never sought leave to appeal to the New York Court of Appeals?

2. Does petitioner, who never applied for an award of counsel fees, have standing to challenge the constitutionality of Section 237 of the New York Domestic Relations Law, a challenge not raised before the trial court?

STATEMENT OF THE CASE

Petitioner here seeks review of an order entered on December 30, 1975 (A. 14) in resolution of a proceeding in which petitioner sought modification of the custody provisions of a New York decree (A. 14

et seq.). That order, inter alia, granted in part respondent's application for an award of counsel fees and disbursements, directing respondent to pay $12,000 in counsel fees and $1,500 in disbursements to his former wife (A. 26). The trial court specifically held that in making such award it was apportioning responsibility for the fees and costs between the parties, and requiring respondent to "share" in such responsibility, based, among other things, upon the parties' respective financial circumstances as presented to the Court in oral testimony (A. 26-7).*

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* The trial court also based its award upon: "[T]he extensive legal services rendered by able counsel for the plaintiff [here, respondent]" (A. 26). The Court recited that it was "[P]rivy to the 'day to day' services rendered during the protracted Hearing [in excess of twenty days] conducted herein." (A. 26). See also, A. 17-18.

That testimony did not include any of the "facts" set forth in the Petition at page 3 (Statement of the Case, second paragraph), but did reveal that respondent's income, inclusive of alimony due but unpaid by petitioner, was less that $12,000 in 1975.

Petitioner appealed from the award of counsel fee and disbursements to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, there raising for the first time the claim that Section 237 of the New York Domestic Relations Law is unconstitutional (A. 14-28). That court reduced the award of counsel fees to $5,000 (A. 13), but declined to rule upon the constitutional challenge, ruling that petitioner:

> "[H]aving failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute." (A. 13).

Petitioner sought to appeal that order of right to the New York Court of Appeals, pursuant to New York Civil Practice Law and Rules § 5601 ("C.P.L.R."). That appeal was dismissed for want of a substantial constitutional question (A. 11). Petitioner never thereafter sought leave to appeal to that court, pursuant to C.P.L.R. § 5602.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I.

THE ORDER, REVIEW OF WHICH IS SOUGHT, WAS NOT FINAL AND THEREFORE THIS COURT IS WITHOUT JURISDICTION.

Petitioner might have sought review of the order of the Appellate Division under C.P.L.R. § 5602(a)(1), following dismissal of his appeal of right. C.P.L.R. § 5514(a). Petitioner having failed to do so, the petition should be denied, as this Court is without jurisdiction. Matthews v. Huwe, 269 U.S. 262 (1925); Hammerstein v. Superior Court, 341 U.S. 491 (1951).

II.

PETITIONER LACKS STANDING TO CHALLENGE THE STATUTE

Petitioner argues that New York Domestic Relations Law, Section 237(b) ("D.R.L. § 237(b)") unconstitutionally discriminates on the basis of sex because denying men the right to be awarded counsel fees in appropriate cases. Petitioner never applied for such fees to the trial

court (A. 17) and therefore is without standing to urge the alleged infirmity of the statute.*

Petitioner has demonstrated no "personal stake in the outcome of the controversy . . . " Baker v. Carr, 369 U.S. 186, 204 (1962). Petitioner has not been injured by the operation of D.R.L. § 237(b). Barrows v. Jackson, 346 U.S. 249 (1953). Petitioner cannot here state that the statute may be impermissibly discriminatory as to some third person. Id.

This Court has consistently declined

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* Petitioner's claim that he "did not apply for an award to him of counsel fees since no such award was authorized under the applicable statute . . . " (Petition, p. 3) is an afterthought, unsupported by the record.

to consider constitutional attacks presented by persons not directly injured by the challenged provisions, see, McGowan v. State of Maryland, 366 U.S. 427, 429 (1961), and should not deviate from such practice here, particularly as petitioner never timely raised this issue before the state trial court.* See, Youakim v. Miller, 425 U.S. 231, 234 (1976).

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* Had the issue been timely raised the state court might well have interpreted D.R.L. § 237(b) in such manner as to remove all doubts as to its propriety. Harrison v. National Association for the Advancement of Colored People, 360 U.S. 167 (1959). The New York courts have done so recently in related areas. See, Carter v. Carter, 58 App. Div. 2d 438, 397 N.Y.S.2d 88 (2nd Dept. 1977).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 13, 1978